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No. 93-1815

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

PEGGY L. BURNS-TOOLE, D.D.S.,
Petitioner

vs.

ROGER P. BYRNE,D.D.S.and
RONALD H. SHAMBLIN, D.D.S.,
Individually and in their Official Capacities,
Respondents

Respondents' Brief in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the Fifth Circuit was correct in its decision to affirm the summary judgment rendered in favor of the Respondents on the basis of qualified immunity, and on the basis of the merits of the Petitioner's complaint.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. §§ 1983, 1985 and 1986, and Tex. Rev. Civ. Stat. Ann. art. 4551j (West 1993)

STATEMENT OF THE CASE

Respondents accept in general the factual description presented by Petitioner, with the exception of Petitioner's characterization of the Fifth Circuit's opinion. Petitioner insists (and this is the basis of her petition for certiorari) that the Fifth Circuit applied a "heightened pleadings" requirement to her §1983 claim. In fact, the Fifth Circuit expressly "declined this invitation [to revisit the case of *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).]"

(Fifth Circuit opinion, attachment A-8 to Petition for Writ of Certiorari) The "disposition of this case turns on the plaintiff's failure to present any evidence that demonstrates that she has been the victim of religious discrimination." *Id.* The Fifth Circuit reviewed the merits of the Petitioner's complaint, not her pleadings.

ARGUMENT FOR DENIAL OF THE WRIT

I. The Court should deny certiorari because the Fifth Circuit was correct in its determination that Petitioner failed to create an issue of material fact on whether the Respondents' conduct was sufficient to sustain a § 1983 claim.

The fulcrum of the Fifth Circuit's analysis lies in Petitioner's failure to meet her burden of overcoming the Respondents' qualified immunity, as asserted in their motion for summary judgment with supporting affidavits. The burden is on the plaintiff to overcome defendant's qualified immunity. *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983). To overcome a state official's qualified immunity, a complainant must establish that the official's conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982). The issue here was whether the Respondents' conduct violated clearly established law. The district court and the Fifth Circuit held that it did not.

Although Petitioner responded to the Respondents' Motion for Summary Judgment with arguments and affidavits and also amended her complaint, she failed to either plead or produce any facts which objectively supported her claim that she failed two dental examinations because either of the Respondents discriminated against her because of her religion. Bare allegations of malice do not suffice to subject a governmental official either to the cost of trial or the burdens of broad-reaching discovery. *Harlow, supra*, 102 S.Ct. at 2738.

Petitioner argues that the Fifth Circuit erred in applying the "heightened pleadings standard" adopted in *Elliot v. Perez*, 751 F.2d 1472 (5th Cir. 1985), because the Supreme Court recently rejected this standard in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160 (1993). However, the Supreme Court in *Leatherman* distinguished a motion to dismiss for failure to state a claim from a motion for summary judgment by noting that "federal court litigants must rely on summary judgment to weed out unmeritorious claims sooner rather than later." *Leatherman, supra*, 113 S.Ct. at 1163. This is exactly what the Respondents did in this case.

II. This Court should deny certiorari because Petitioner has misinterpreted *Hafer v. Melo* in asserting that Respondents have personal liability in their official capacities

Petitioner argues that the Fifth Circuit erred in "failing to address the individual liability of the defendants in their official capacities." For support, she cites *Hafer v. Melo*, 112 S.Ct. 358 (1991). In their official capacities, the Respondents have no personal liability. State officials may be held liable for damages only in their individual capacities under 42 U.S.C. §1983. *See Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989). The Fifth Circuit did address the issue of individual liability in its discussion of qualified immunity and the merits of Petitioner's complaint.

Petitioner also argues that the Fifth Circuit erred in denying injunctive relief as against the Respondents in their official capacities. The decision on the merits of this case--that is, that Petitioner failed to create an issue of material fact--disposed of any outstanding issue as to whether the official capacity defendants were liable for violating Petitioner's rights, and hence whether Petitioner was entitled to any injunctive relief.

III. This Court should deny certiorari because the Fifth Circuit was correct in its determination that 42 U.S.C. § 1985 applies only to conspiracies motivated by class-based animus.

Although Petitioner insists that the Fifth Circuit's opinion "affirmed, without comment, that 42 U.S.C. §§1985 and 1986 apply only to conspiracies motivated by racial animus," in fact, the Fifth Circuit expressly declined to "join the legal debate concerning the reach of §1985 and address specifically whether it applies to religious discrimination" because such a decision was "unnecessary to the resolution of the present case." Instead, the Fifth Circuit's opinion turns on the narrow issue of Petitioner's failure to identify evidence in support of the proposition that the state officials in question discriminated against Seventh Day Adventists *as a class*.

IV. This Court should deny certiorari because the Fifth Circuit was correct in its determination that Tex. Rev. Civ. Stat. Ann. Articles 4551j is not a waiver of qualified immunity.

Tex. Rev. Civ. Stat. Ann. article 4551j (West 1993) states:

> In the absence of fraud, conspiracy, or malice, no member of the Texas State Board of Dental Examiners. . .shall be liable or subject to suit or suits for damages for alleged injury, wrong, loss or damage allegedly caused by any of the said persons for any investigation, report, recommendation, statement, evaluation, finding, order, or award made in the course of any of said persons performing assigned, designated, official, or statutory duties. *This immunity is enacted to relieve and protect the persons named from being harassed and threatened with legal action while attempting to perform official duties.*

Emphasis added.

Contrary to Petitioner's argument, this article is *not* a waiver of qualified immunity in federal court but is, on its face, a grant of absolute immunity in state court.

Furthermore, assuming *arguendo* that this statute waives immunity, it can waive it only in state court and not federal court. A state legislature may abrogate immunity in state court by statute but does not have the power to amend federal law to abrogate state defendants' qualified immunity in federal court. Article 4551j is not a clear and unambiguous waiver of state officials' qualified immunity. On its face, *article 4551j is simply not a waiver*.

CONCLUSION

Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent via U.S. Mail, certified, return receipt requested on this the 20th day of May, 1994 to:

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